



TO: Members of the Troy City Council

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SUBJECT: 2012 Fourth Quarter Litigation Report

The following is the quarterly report of pending litigation and other matters of interest. **Developments during the FOURTH quarter of 2012 are in bold.**

A. ANATOMY OF THE CASE

Once a lawsuit has been filed against the City or City employees, the City Attorney's office prepares a memo regarding the allegations in the complaint. At that time, our office requests authority from Council to represent the City and/or the employees. Our office then engages in the discovery process, which generally lasts for several months, and involves interrogatories, requests for documents, and depositions. After discovery, almost all cases are required to go through case evaluation (also called mediation). In this process, three attorneys evaluate the potential damages, and render an award. This award can be accepted by both parties, and will conclude the case. However, if either party rejects a case evaluation award, there are potential sanctions if the trial result is not as favorable as the mediation award. In many cases, a motion for summary disposition will be filed at the conclusion of discovery. In all motions for summary disposition, the Plaintiff's version of the facts are accepted as true, and if the Plaintiff still has failed to set forth a viable claim against the City, then dismissal will be granted. It generally takes at least a year before a case will be presented to a jury. It also takes approximately two years before a case will be finalized in the Michigan Court of Appeals and/or the Michigan Supreme Court.

B. ZONING CASES

These are cases where the property owner has sued for a use other than that for which the land is currently zoned and/or the City is suing a property owner to require compliance with the existing zoning provisions.

1. Grand Sakwa v. City of Troy- Grand Sakwa filed this case, seeking relief from the Court, which had jurisdiction of the matter based on a Consent Judgment that allowed for the highly intense commercial and residential development on approximately 77 acres of property known as Midtown. The Consent Judgment provided that a small parcel to the rear of the shopping center was donated to the City for transportation center purposes. The Consent Judgment required the transportation center to be "funded" on or before June 2, 2010. If this condition was

not satisfied, then the property would revert to Grand Sakwa. Shortly after the June 2, 2010 date, Grand Sakwa filed this action, seeking a Court ordered reversion of the property. Grand Sakwa argued that the transit center was not funded by June 2, 2010, as required by the Consent Judgment. The City countered by relying on the City's budgetary allocations since 2006, and also the federal funding, where 8.4 million dollars was awarded under the American Recovery Reinvestment Recovery Act of 2009- High Speed Intercity Passenger Rail Program (HSIPR) and 1.3 million dollars was appropriated in the December 16, 2009 Transportation, Housing and Urban Development Appropriations Act, Bus and Bus Facility Program. The City also argued that the language of the consent judgment did not require "full funding" or "irrevocable funding" or preclude the use of a reimbursable grant in satisfaction of the terms of the judgment. On May 25, 2011, the Oakland County Circuit Court entered an order in favor of the City, and denied Grand Sakwa's request for a reversion of property. On June 15, 2011, Grand Sakwa filed a Motion for Reconsideration. The Court ordered the City to file a response to the Motion for Reconsideration. On September 22, 2011, the Court denied the Plaintiff's Motion for Reconsideration. On September 29, 2011, Plaintiff filed an appeal with the Michigan Court of Appeals. On October 11, 2011, the Michigan Court of Appeals dismissed the claim of appeal, since there is no appeal of right from a post-judgment order. Grand Sakwa filed a Motion for Reconsideration on October 28, 2011, which was denied by the Court of Appeals on December 8, 2011. Prior to receiving this decision, Grand Sakwa also filed a Delayed Application for Leave to Appeal on November 22, 2011. The parties are now waiting for a decision from the Michigan Court of Appeals. On July 30, 2012, the Michigan Court of Appeals granted Grand Sakwa's delayed application for leave to appeal. Grand Sakwa filed its Brief on Appeal on September 19, 2012, and the City's Brief on Appeal must be filed on or before October 24, 2012. **The legal briefs have been timely filed and the parties are now waiting for the Court to schedule oral argument.**

2. *Lamar Advertising v City of Troy* (2012 State Court Civil Action). Based on the dismissal of their case in the federal court, Lamar Advertising, a billboard company, filed a new civil action on June 27, 2012 in Oakland County Circuit Court alleging the City's sign ordinance violates the Home Rule Cities Act. The case was assigned to Judge James M. Alexander. The Court entered an Order Re-Assigning the case to Judge Martha D. Anderson, who heard the other Lamar case. Troy filed a motion for summary disposition requesting a dismissal of this case. On September 19, 2012, Judge Anderson granted the motion and dismissed the case. **Lamar Advertising has appealed this decision to the Michigan Court of Appeals.**

C. EMINENT DOMAIN CASES

These are cases in which the City wishes to acquire property for a public improvement and the property owner wishes to contest either the necessity or the compensation offered. In cases where only the compensation is challenged, the City

obtains possession of the property almost immediately, which allows for major projects to be completed.

There are no pending condemnation cases for this quarter.

D. CIVIL RIGHTS CASES

These are cases that are generally filed in the federal courts, under 42 U.S.C. Section 1983. In these cases, the Plaintiffs argue that the City and/or police officers of the City of Troy somehow violated their civil rights.

1. Alan A. May, as Personal Representative of the Estate of Jesus Gillard v. Bloomfield Township, Troy, et. al – Plaintiff, Alan A. May, is the personal representative of the estate for the deceased Jesus Gillard. Gillard was involved in a police pursuit that was initiated in Bloomfield Township by its police officers. The pursuit ended in the City of Troy at the intersection of Big Beaver Road and Adams Road when Gillard's van collided with an SUV driven by a civilian. After the collision, Gillard continued to attempt to flee and elude police officers from both Bloomfield Township and Troy. He actively resisted the officers' attempts to subdue him and place him under arrest. At some time after Gillard was handcuffed, he stopped breathing. The defendants in the lawsuit are the City of Troy and individual officers from the police department as well as Bloomfield Township and individual officers from its police department. This wrongful death lawsuit alleges constitutional violations against the defendants, including failure to train and deliberate indifference to a serious medical need. The case was filed in the United States District Court for the Eastern District of Michigan and assigned to the Honorable Judge Robert Cleland. The parties are obtaining discovery in this matter. The parties continue to conduct discovery in this matter. Depositions of Plaintiff's expert witnesses have been scheduled and will continue through the beginning of November. The City plans to file a Motion for Summary Judgment on or before the cut-off date which is November 14, 2012. **The City timely filed its Motion for Summary Judgment, and the parties are now awaiting oral argument before the Court.**

E. PERSONAL INJURY AND DAMAGE CASES

These are cases in which the Plaintiff claims that the City or City employees were negligent in some manner that caused injuries and/or property damage. The City enjoys governmental immunity from ordinary negligence, unless the case falls within one of four exceptions to governmental immunity: a) defective highway exception, which includes sidewalks and road way claims; b) public building exception, which imposes liability only when injuries are caused by a defect in a public building; c) motor vehicle exception, which imposes liability when an employee is negligent when operating their vehicle; d) proprietary exception, where liability is imposed when an

activity is conducted primarily to create a profit, and the activity somehow causes injury or damage to another; e) trespass nuisance exception, which imposes liability for the flooding cases.

1. **Detroit Edison Company v City of Troy Department of Public Works** – The Detroit Edison Company filed a complaint in the 52-4 District Court seeking damages against the City for cost to repair an electrical service line. Detroit Edison alleges that the electrical service line was damaged by City of Troy DPW workers when they were repairing a drain line. The lawsuit seeks \$4,347.62 in damages plus costs, interest and attorney fees. The Plaintiff alleges the City workers were negligent and that the City failed to comply with the provisions of the MISS DIGG Act. The case was assigned to Judge Bolle.

F. MISCELLANEOUS CASES

1. **Michigan Association of Home Builders; Associated Builders and Contractors of Michigan; and Michigan Plumbing and Mechanical Contractors Association v. City of Troy** – The Plaintiffs filed a complaint for Declaratory and Injunctive Relief in the Oakland County Circuit. On the date of filing the Plaintiffs also filed a Motion for Preliminary Injunction and Order to Show Cause. The Plaintiffs allege that the City of Troy has violated Section 22 of Michigan's Stille-DeRossett Hale Single State Construction Code Act by collecting fees for building department services that are not reasonably related to the cost of providing building department services. They are alleging that the City of Troy has illegally entered into a contract with Safe Built of Michigan, Inc. for building services that provides that 20% of each building permit fee be returned to the City to cover services that are not "reasonably related to the cost of building department services," as required by state statute. The Plaintiffs also assert a violation of the Headlee Amendment, arguing that the 20% returned to the City is a disguised tax that was not approved by voters. The Plaintiffs are asking for a declaratory judgment, as well as a return of any "surplus" building department service funds collected to date. Plaintiffs also request an order requiring the City to reduce its building department fees. The City of Troy was served with the Complaint and the Motion for Preliminary Injunction and Order for Show Cause on Wednesday, December 15, 2010. The parties were required to appear at Court on Wednesday, December 22, 2010, but the Court did not take any action at that time. Instead, the Court adjourned the matter to January 19, 2011. In the interim, the parties may engage in preliminary discovery in an attempt to resolve this matter. The parties are conducting discovery. The parties have completed discovery. Trial in this matter is scheduled for January 30, 2012. After being presented with motions for summary disposition, the Court ordered the parties to engage in mediation with a neutral municipal audit professional. Financial documents concerning this case are now being reviewed by an independent CPA. It is

expected that the April 19, 2012 trial date will be postponed until after this review is complete. Mediation was unsuccessful in resolving this case, and therefore the Court is expected to issue an order on the pending Summary Disposition Motions. The trial date has been adjourned. **On November 13, 2012, Oakland County Circuit Court Judge Shalina Kumar issued her order in favor of the City, and dismissed this case. Plaintiffs filed an appeal, which is now pending in the Michigan Court of Appeals.**

2. *T.R. Pieperzak v. City of Troy.* This case has been filed by the successful bidder for the Section 9 water main replacement contract, seeking approximately \$900,000 over the contract bid for alleged additional work, unanticipated conditions and delays that Plaintiff attributes to the City of Troy. Plaintiff filed a Motion for Partial Summary Disposition, which the City responded to. Argument on this Motion is scheduled for July 6, 2011. The Court denied Plaintiff's Motion for Partial Summary Disposition. The case is now in discovery. Case evaluation for the case took place on November 17, 2011. The City and the Plaintiff each filed Motions for Summary Disposition at the close of discovery. The Court agreed with the amount the City claimed was due on the contract and entered an Order on March 9, 2012 that dismissed Plaintiff's claims seeking damages in excess of that amount. The Order is a final order and closes the case. T.R. Pieprzak filed a Motion for Reconsideration on March 29, 2012. The Court has not yet issued an opinion on Pieprzak's Motion for Reconsideration.
3. *Troy Police Officers Association v. City of Troy and Act 78 Civil Service Commission.* Plaintiff TPOA Union has filed this lawsuit against the City and also the Act 78 Civil Service Commission, seeking a hearing on behalf of one of its members, Todd Michael. Mr. Michael seeks a hearing before the Civil Service Commission, where he can have the chance to establish that he was constructively discharged from the City; or in the alternative that he was improperly disciplined by the City. In addition to seeking a court order mandating a hearing for Todd Michael, Plaintiff is also seeking an order requiring the City to amend its rules to allow for hearings in similar circumstances. The Amended Complaint was filed on May 21, 2012. On September 18, 2012, Plaintiff filed a Motion for Summary Disposition, which is scheduled for hearing on November 21, 2012. **On December 5, 2012, the Court granted in part, denied in part the cross motions for summary disposition. This case is now pending in the Michigan Court of Appeals.**
4. *Rodney Knutson v. City of Troy et. al.* Plaintiff has filed this lawsuit against the City and one of its officers, alleging breach of implied contract or oral agreement and conversion of property. In this case, the Troy Police Department agreed to temporarily store a large amount of cash that would have otherwise been left unattended at Plaintiff's house. There was a \$1000 discrepancy as to the amount of cash that was temporarily safeguarded by the Troy Police Department. The City has filed an Answer to the Complaint and Affirmative Defenses. A pre-trial is scheduled for October 29, 2012 with Judge Kirsten Nielsen Hartig, 52-4th

District Court. **Based on potential conflicts, the Troy District Court transferred this case to the Novi District Court, which scheduled a January pre-trial conference.**

5. *Todd Michael v. City of Troy et. al.-* Todd Michael has filed this lawsuit against the City, the Troy Police Department and the Troy Police Chief. Through this lawsuit, Plaintiff alleges that he was discriminated against in his employment with the City, in violation of the Americans With Disabilities Act. He also alleges that he suffered retaliation for his alleged disability. He is asking to be reinstated as a Troy Police Officer. He is also asking for additional compensation, punitive damages, costs and attorney fees. The answer to the complaint and affirmative defenses were filed on September 27, 2012. **The Court has issued a scheduling order in this case, and discovery is on-going.**

6. *Citizens United Against Corrupt Government v. Troy City Council-* This is a lawsuit filed by the Citizens Against Corrupt Government, which is a Michigan Non-Profit Corporation formed by Robert Davis. In this lawsuit, Plaintiff alleges that the City violated the Open Meetings Act in holding a closed session on August 15, 2012, as part of the City Manager Search process. Through this lawsuit, Plaintiff is seeking a declaration that the City Council violated the Open Meetings Act. Plaintiff also asked for injunctive relief, and asked for an immediate hearing. The Court, after hearing arguments from the parties, denied the request for Injunctive relief with an order dated September 13, 2012. Immediately thereafter, Plaintiff attempted to schedule depositions of individual City Council members and other members of City Administration and the search consultant. The City filed a Motion for a Protective Order on September 28, 2012. On that day, the City also filed a Motion for Summary Disposition, arguing that Plaintiff does not have a viable case against the Troy City Council. **On November 21, 2012, Judge O'Brien issued her order granting the City's Motion for Summary Disposition and dismissing this case. Plaintiff appealed this decision, which is now pending in the Michigan Court of Appeals.**

7. *Robert Davis v. City of Troy et. al.-* This lawsuit was filed by Robert Davis against the City of Troy, Troy City Council and Troy City Clerk M. Aileen Bittner, alleging that the City violated the Freedom of Information Act (FOIA) when it denied Mr. Davis' request for all of the applications and resumes of the non-finalist city manager candidates. This lawsuit was filed in Wayne County, as allowed under FOIA, and assigned to Judge Robert Colombo. One week after filing this lawsuit, Plaintiff scheduled a hearing for his requested emergency relief. The Court granted the City a very short extension of time to file its response, which was a Cross Motion for Summary Disposition. The Court held oral arguments on November 9, 2012, and granted the City's Motion and dismissed the case. The Court order was entered on November 28, 2012. **This case is now concluded.**

8. **National Public Finance Guarantee Corporation v. City of Troy-** This lawsuit was served on the City of Troy on October 18, 2012. The Plaintiff, National Public Finance Guarantee Corporation (NPFG), is an insurer on bonds issued by the Troy Downtown Development Authority. NPFG filed a Freedom of Information Request (FOIA), looking for financial documents from the City of Troy. Through this lawsuit, Plaintiff argues that the City did not fully comply with FOIA when responding to the FOIA request. The City has filed an answer, and the parties are conducting discovery.

9. **Citizens United and Robert Davis v. Troy, Michigan Secretary of State-** This post-recall election case was filed in an effort to force a February 26, 2013 election in the City of Troy for the unexpired term of Mayor. Plaintiffs argued that they had standing to bring this case, based on the support of an unidentified candidate who was seeking election. Oakland County Circuit Court Judge Denise Langford Morris rejected this argument at a hearing on December 5, 2012, and entered an order dismissing this case in favor of the City and State defendants. This case is now concluded.

10. **Secretary of State v. Troy City Clerk and Troy Election Commission-** This case was filed the day after the Citizens United case, and was also assigned to Oakland County Circuit Court Judge Denise Langford Morris. In this lawsuit, the Michigan Secretary of State sought an order requiring the City to hold a February 26, 2013 election in order to fill the vacancy created by the November 2012 recall of Janice Daniels. After reviewing written and oral argument, the Court determined that a May 2013 election would be required, and the order setting forth the election dates was entered on December 19, 2012. This case is now concluded.

G. CRIMINAL APPEALS

These are cases involving an appeal from a decision of the 52-4 District Court in an ordinance prosecution case.

1. **People v John Haggarty.** The Defendant was arrested for operating while intoxicated after he was found in a parked vehicle with its engine running near the vacuum stations at a car wash. Police investigation revealed the Defendant was intoxicated. The Defendant filed a motion to dismiss, claiming there was insufficient evidence the Defendant operated the vehicle on a public road or any place open to the general public or generally accessible to motor vehicles. After an evidentiary hearing, District Court Judge Bolle denied the Defendant's motion, allowing the criminal case to proceed to a jury trial. The Defendant appealed that decision to the Oakland County Circuit Court. The assigned judge, Judge Rae Lee Chabot, denied Defendant's requested relief on July 20, 2011. The Defendant has now filed an Application for Leave to Appeal in the Michigan Court of Appeals. The City timely filed its response by the September 27, 2011

deadline. The parties are now waiting for the Michigan Court of Appeals to decide whether to allow the requested appeal. On April 13, 2012, the Court of Appeals granted Defendant's Application for Leave to Appeal. The Defendant has filed a Brief on Appeal. The City's Brief on Appeal is due June 25, 2012. The Court entertained oral arguments, and issued a written order affirming the District Court Judge and the City's position on September 27, 2012. The criminal case has now been remanded to the District Court. **The Defendant filed an application requesting leave to appeal with the Michigan Supreme Court. The District Court has stayed the proceedings pending the decision.**

ADMINISTRATIVE PROCEEDINGS

1. *In the matter of the Petitions on National Pollution Discharge Elimination Systems (NPDES Phase II General Permits)*. The City has joined several other municipalities in challenging several of the mandates in the NPDES Phase II General Permit, which was recently issued by the MDEQ. The new NPDES permit requires some storm water management techniques that exceed the federal mandates, and/or are not justified, based on the high cost of the mandate, in relation to the nominal environmental benefits. A status conference for the parties is set for October 1, 2008. The municipalities are currently exploring the coordination of efforts with other parties. Community representatives are meeting with representatives from the MDEQ to discuss possible resolutions of this matter without the necessity of a full blown administrative hearing. The parties are continuing to negotiate with the MDEQ. The City of Riverview filed a class action complaint in the Ingham County Circuit Court, challenging the permit requirements as unfunded mandates. The petitioners to the NPDES permit administrative proceeding are named as participants in the proposed class action lawsuit. As a result, the class action determination may have an impact on the administrative proceeding. The motion for class certification is scheduled for October 15, 2009. Class certification was granted. Hearings regarding the procedure for the new class action are set for January 2010. The Court granted class action status, and the administrative proceedings are now being delayed. Status reports have been filed and reviewed, and we continue to monitor any new developments. On October 14, 2010, the Michigan Court of Appeals reversed the order granting a stay of the contested cases. On November 19, 2010, the Ingham County Circuit Court (the class action lawsuit) entered an order granting in part the dismissal of some of the claims. The remaining claims, including a Headlee claim, will be decided by the Court. Subsequently, the Assistant Attorney General, on behalf of the Michigan Department of Natural Resources and Environment (MDNRE) attempted to withdraw all of the remaining NPDES permits, which would mean that the whole process would need to be started from scratch. Since this action would likely result in a significant delay and a duplication of all efforts to date, several municipalities filed objections to this unilateral action. The MDNRE was given until December 22, 2010 to file a formal motion seeking a dismissal of the remaining NPDES permits. On August 9, 2011, the Administrative Law Judge

held the case in abeyance, due to pending case at the Michigan Court of Appeals. The parties will continue to provide status reports in the interim. The Court is continuing to receiving status reports, with the next one due on December 19, 2012. **Status reports were timely filed.**

If you have any questions concerning these cases, please let us know.